

111TH CONGRESS
1ST SESSION

S. 448

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 13, 2009

Mr. SPECTER (for himself, Mr. SCHUMER, Mr. LUGAR, and Mr. GRAHAM) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Free Flow of Informa-
5 tion Act of 2009”.

1 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-**
2 **SONS.**

3 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—In
4 any proceeding or in connection with any issue arising
5 under Federal law, a Federal entity may not compel a cov-
6 ered person to provide testimony, or produce any docu-
7 ment, relating to protected information, unless a Federal
8 court determines by a preponderance of the evidence, after
9 providing notice and an opportunity to be heard to such
10 covered person—

11 (1) that the party seeking to compel production
12 of such testimony or document has exhausted all
13 reasonable alternative sources (other than a covered
14 person) of the testimony or document;

15 (2) that—

16 (A) in a criminal investigation or prosecu-
17 tion, based on information obtained from a
18 source other than the covered person—

19 (i) there are reasonable grounds to be-
20 lieve that a crime has occurred;

21 (ii) the testimony or document sought
22 is essential to the investigation or prosecu-
23 tion or to the defense against the prosecu-
24 tion; and

25 (iii) in a criminal investigation or
26 prosecution of an unauthorized disclosure

1 of properly classified information by a per-
2 son with authorized access to such infor-
3 mation, such unauthorized disclosure has
4 caused or will cause significant and
5 articulable harm to the national security;
6 or

7 (B) in a matter other than a criminal in-
8 vestigation or prosecution, based on information
9 obtained from a source other than the covered
10 person, the testimony or document sought is es-
11 sential to the resolution of the matter; and

12 (3) that nondisclosure of the information would
13 be contrary to the public interest, taking into ac-
14 count both the public interest in compelling disclo-
15 sure and the public interest in gathering news and
16 maintaining the free flow of information.

17 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

18 The content of any testimony or document that is com-
19 pelled under subsection (a) shall, to the extent possible—

20 (1) be limited to the purpose of verifying pub-
21 lished information or describing any surrounding cir-
22 cumstances relevant to the accuracy of such pub-
23 lished information; and

24 (2) be narrowly tailored in subject matter and
25 period of time covered so as to avoid compelling pro-

1 duction of peripheral, nonessential, or speculative in-
2 formation.

3 **SEC. 3. EXCEPTION RELATING TO CRIMINAL OR TORTIOUS**
4 **CONDUCT.**

5 (a) IN GENERAL.—Section 2 shall not apply to any
6 information, record, document, or item obtained as the re-
7 sult of the eyewitness observations of alleged criminal con-
8 duct or commitment of alleged criminal or tortious con-
9 duct by the covered person, including any physical evi-
10 dence or visual or audio recording of the observed conduct.

11 (b) EXCEPTION.—This section shall not apply, and
12 section 2 shall apply, if the alleged criminal or tortious
13 conduct is the act of communicating the documents or in-
14 formation at issue.

15 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING, OR**
16 **SUBSTANTIAL BODILY INJURY.**

17 Section 2 shall not apply to any protected information
18 that is reasonably necessary to stop, prevent, or mitigate
19 a specific case of—

- 20 (1) death;
21 (2) kidnapping; or
22 (3) substantial bodily harm.

1 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR**
2 **HARM TO THE NATIONAL SECURITY.**

3 Section 2 shall not apply to any protected information
4 that a Federal court has found by a preponderance of the
5 evidence would assist in preventing—

6 (1) an act of terrorism; or

7 (2) other significant and articulable harm to
8 national security that would outweigh the public in-
9 terest in newsgathering and maintaining a free flow
10 of information to citizens.

11 **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**
12 **SERVICE PROVIDERS.**

13 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—
14 With respect to testimony that relates to a communication
15 to which a covered person is a party or any document that
16 consists of any record or other information relating to a
17 communication to which a covered person is a party, or
18 that contains the contents of a communication to which
19 a covered person is a party, section 2 shall apply to such
20 testimony or document if sought from the communications
21 service provider in the same manner that such section ap-
22 plies to any testimony or document sought from a covered
23 person.

24 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
25 ERED PERSONS.—A Federal court may compel the testi-
26 mony or disclosure of a document described in this section

1 only after the party seeking such testimony or document
 2 provides the covered person who is a party to the commu-
 3 nication described in subsection (a)—

4 (1) notice of the subpoena or other compulsory
 5 request for such testimony or disclosure from the
 6 communications service provider not later than the
 7 time at which such subpoena or request is issued to
 8 the communications service provider; and

9 (2) an opportunity to be heard before the court
 10 before compelling testimony or the disclosure of a
 11 document.

12 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
 13 under subsection (b)(1) may be delayed for not more than
 14 45 days if the court involved determines by clear and con-
 15 vincing evidence that such notice would pose a substantial
 16 threat to the integrity of a criminal investigation. This pe-
 17 riod may be extended by the court for an additional period
 18 of not more than 45 days each time the court makes such
 19 a determination.

20 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITH-**
 21 **OUT PROMISE OR AGREEMENT OF CON-**
 22 **FIDENTIALITY.**

23 Nothing in this Act shall supersede, dilute, or pre-
 24 clude any law or court decision compelling or not compel-

ling disclosure by a covered person or communications
service provider of—

(1) information identifying a source who provided information without a promise or agreement of confidentiality made by the covered person as part of engaging in journalism; or

(2) records, other information, or contents of a communication obtained without a promise or agreement that such records, other information, or contents of a communication would be confidential.

SEC. 8. DEFINITIONS.

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER.—

The term “communications service provider”—

(A) means any person that transmits information of the customer’s choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in section 3 or 230 of the Communications Act of 1934 (47 U.S.C. 153 and 230)).

(2) COVERED PERSON.—The term “covered person”—

1 (A) means a person who is engaged in
2 journalism;

3 (B) includes a supervisor, employer, parent
4 company, subsidiary, or affiliate of a person de-
5 scribed in subparagraph (A); and

6 (C) does not include any person who is—

7 (i) a foreign power or an agent of a
8 foreign power, as those terms are defined
9 in section 101 of the Foreign Intelligence
10 Surveillance Act of 1978 (50 U.S.C.
11 1801);

12 (ii) a foreign terrorist organization
13 designated under section 219(a) of the Im-
14 migration and Nationality Act (8 U.S.C.
15 1189(a));

16 (iii) designated as a Specially Des-
17 ignated Global Terrorist by the Depart-
18 ment of the Treasury under Executive
19 Order Number 13224 (50 U.S.C. 1701);

20 (iv) a specially designated terrorist, as
21 that term is defined in section 595.311 of
22 title 31, Code of Federal Regulations (or
23 any successor thereto); or

24 (v) a terrorist organization, as that
25 term is defined in section

1 212(a)(3)(B)(vi)(II) of the Immigration
 2 and Nationality Act (8 U.S.C.
 3 1182(a)(3)(B)(vi)(II)).

4 (3) DOCUMENT.—The term “document” means
 5 writings, recordings, and photographs, as those
 6 terms are defined by rule 1001 of the Federal Rules
 7 of Evidence (28 U.S.C. App.).

8 (4) FEDERAL ENTITY.—The term “Federal en-
 9 tity” means an entity or employee of the judicial or
 10 executive branch or an administrative agency of the
 11 Federal Government with the power to issue a sub-
 12 poena or issue other compulsory process.

13 (5) JOURNALISM.—The term “journalism”
 14 means the regular gathering, preparing, collecting,
 15 photographing, recording, writing, editing, reporting,
 16 or publishing of news or information that concerns
 17 local, national, or international events or other mat-
 18 ters of public interest for dissemination to the pub-
 19 lic.

20 (6) PROTECTED INFORMATION.—The term
 21 “protected information” means—

22 (A) information identifying a source who
 23 provided information under a promise or agree-
 24 ment of confidentiality made by a covered per-
 25 son as part of engaging in journalism; or

1 (B) any records, contents of a communica-
2 tion, documents, or information that a covered
3 person obtained or created—

4 (i) as part of engaging in journalism;
5 and

6 (ii) upon a promise or agreement that
7 such records, contents of a communication,
8 documents, or information would be con-
9 fidential.

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